# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 114.

ALBERTO ARMSTRONG, AS LIQUIDATOR OF THE FIRM OF BOYSEN & COMPANY, APPELLANT,

*vs.*

EDUARDO FERNANDEZ, JUAN BAUTISTA PACHECO, AND GENARA JUSINO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

FILED OCTOBER 2, 1906.

(20,387.)

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1 At a Special Term of the District Court of the United States within and for the District of Porto Rico begun and had at the City of Ponce, Porto Rico, in said District on the 16th day of July, A. D. 1906, and of the Independence of the United States of America the 131st.

Present: The Honorable Bernard S. Rodey, Judge.

Bankruptcy No. 11.

EDUARDO FERNANDEZ, JUAN BAUTISTA PACHECO, and GENARA JUSINO
*vs.*
PASCASIO ALVARADO.

Be it remembered that heretofore, to wit: on the 29th day of March, A. D. 1906, at one o'clock P. M. came the petitioners by their attorney N. R. Canales, Esq., and filed in the Clerk's office a petition in duplicate praying that Pascasio Alvarado be adjudged a bankrupt. Said petition is as follows, to wit:

*Petition.*

In the District Court of the United States for Porto Rico.

To the Honorable Charles McKenna, Judge of the above said Court:

The petition of Eduardo Fernandez and of Juan Bautista Pacheco and of Genara Jusino, all residing in Juana Diaz, P. R., respectfully shows:

That Pascasio Alvarado of Juana Diaz has for the greater portion of six months next preceding the date of filing this petition, had his principal place of business at Juana Diaz, Puerto Rico, and owes debts to the amount of one thousand dollars ($1,000).

2 That your petitioners are creditors of said Pascasio Alvarado having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of $500. That the nature and amount of your petitioners' claims are as follows:

*Claim of Eduardo Fernandez.*

Account current for goods supplied at various dates up to February 10th, 1906..... $1,182.53

*Claim of Juan Bautista Pacheco.*

Account current, various dates up to March 7th, 1906... $19.00

*Claim of Genara Jusino.*

Account current, various dates up to April 15th, 1905.. $396.60

And your petitioners further represent that said Pascasio Alvarado is insolvent, and that within four months next preceding the date of this petition the said Pascasio Alvarado committed an act of bankruptcy, in that he did heretofore, to wit, on the 28th day of February, A. D. 1906, permit and suffer several of his creditors, to wit, Alberto Armstrong *et al.* to secure and obtain an advantage through legal proceedings over his creditors, in that he suffered and permitted the said — to attach all of his properties and interest real and personal by virtue of a writ of *fieri-facias* issued out of the United States District Court for Porto Rico on January 20th, A. D. 1906, on a judgment rendered in the above said Court on the January Term, A. D. 1906, in favor of the said Alberto Armstrong *et al.* and against the said Pascasio Alvarado.

And your petitioners further represent that within four months next preceding the date of this petition, the said Pascasio
3 Alvarado did commit other act of bankruptcy in that he did, heretofore, to wit, on the 14th day of March, 1906, in a letter addressed to Eduardo Fernandez, one of the petitioners, admit his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

Wherefore your petitioners pray that service of this petition with a subpœna may be made upon said Pascasio Alvarado as provided in the Acts of Congress relating to bankruptcy, and that he may be adjudged by the Court to be a bankrupt within the purview of said Acts.

(Signed) J. B. PACHECO,
EDUARDO FERNANDEZ.
GENARA JUSINO,
*Petitioners.*

N. R. CANALES, *Attorney.*

UNITED STATES OF AMERICA, *District of Porto Rico:*

Eduardo Fernandez, Juan Bautista Pacheco and Genara Jusino, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

Before me, Pedro Monclova, this 28th day of March, 1906.

(Signed) PEDRO MONCLOVA,
*Justice of the Peace.*

Thereupon an order was entered upon the order book of said Court in said cause, which said order is as follows, to wit:

*Order.*

United States District Court for Porto Rico.

In the Matter of PASCASIO ALVARADO, Bankrupt.

Upon consideration of the petition of Eduardo Fernandez, Juan Bautista Pacheco and Genara Jusino that Pascasio Alvarado be declared bankrupt, it is ordered that the said Pascasio Alvarado do appear at this Court as a Court of Bankruptcy to be holden at
4 Ponce in the District aforesaid on the 13th day of April, A. D. 1906, at 10 o'clock in the forenoon, and show cause why the prayer of said petition should not be granted, and it is further ordered that a copy of said petition together with a writ of subpœna be served on said Pascasio Alvarado by delivering the same to him personally or by leaving the same at his last usual place of abode in said District at least five days before the day aforesaid.

Witness the Honorable Charles F. McKenna, Judge of said Court, and the seal thereof, at Ponce in said District on the 29th day of March, 1906.

H. H. SCOVILLE,
*Clerk U. S. District Court of Porto Rico,*
By A. AGUAYO,
*Deputy Clerk.*

And on the same day and year last aforesaid there was issued out of the Clerk's office of the aforesaid Court a writ of subpœna directed to Pascasio Alvarado in this case, which said writ is as follows, to wit:

*Writ of Subpœna.*

UNITED STATES OF AMERICA, *District of Porto Rico, ss:*

In the District Court of the United States for Porto Rico.

No. 11. In Bankruptcy.

In the Matter of PASCASIO ALVARADO.

To Pascasio Alvarado in the said District, Greeting:

For certain causes offered before the District Court of the United States of America, within and for the District of Porto Rico, as a Court of Bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear before our District Court to be holden at Ponce
5 in said District on the 13th day of April, 1906, to answer a petition filed by Eduardo Fernandez, Juan Bautista Pacheco

and Genara Jusino in our said Court praying that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in this behalf, and this you are in nowise to omit, under the pains and penalties of what may befall thereon.

Witness: the Honorable Chas. F. McKenna, Judge of said Court, and the seal thereof, at Ponce, P. R. this 29th day of March, 1906.

H. H. SCOVILLE,
*Clerk U. S. District Court of Porto Rico.*
By A. AGUAYO,
*Deputy Clerk.*

And afterwards, to wit, on the 6th day of April, A. D. 1906, came the United States Marshal for this District of Porto Rico, to whom the aforesaid writ of subpœna and a duplicate of the aforesaid petition had been delivered for service, and returned the aforesaid writ of subpœna with his proceedings endorsed thereon as follows, to wit:

*Return.*

I hereby certify and return that I received the within writ on the 29th day of March, 1906, and served the same on Pascasio Alvarado, the within named defendant, by leaving a true and correct copy thereof together with a true and correct copy of the petition with Pascasio Alvarado personally at Juana Diaz, this the 30th day of March, 1906.

H. S. HUBBARD,
*U. S. Marshal,*
By GEO. TRAUTMAN, *Deputy.*

And afterwards, to wit, April 24th, 1906, an order was entered upon the order book of said Court in said cause, which said order is as follows, to wit:

6 *Order.*

UNITED STATES OF AMERICA, *District of Porto Rico, ss:*

In the United States District Court in and for Said District.

Ponce Division.

No. 11. In Bankruptcy.

In the Matter of PASCASIO ALVARADO.

*Order of Reference in Judge's Absence.*

Whereas, on the 29th day of March, A. D. 1906, a petition was filed to have Pascasio Alvarado of Juana Diaz, Porto Rico, and District aforesaid, adjudged a bankrupt according to the provision of the

Acts of Congress relating to bankruptcy; and whereas, the judge of said Court was absent from the said Division of District on the next day after the last day on which pleadings might have been filed by the bankrupt or any of his creditors, and none have been filed,

It is thereupon ordered, that the said matter be referred to Santiago Oppenheimer, Esq., City of Ponce and District of Porto Rico, one of the Referees in Bankruptcy of this Court, to consider said petition and take such proceedings therein as are required by said Acts; and that the said Pascasio Alvarado shall attend on the 28th day of April, A. D. 1906, at 10 o'clock A. M. at the office of said Referee at No. — Salud Street, Ponce, P. R.

Witness, my hand and the seal of said Court at Ponce, P. R. in said District on the 24th day of April, A. D. 1906.

H. H. SCOVILLE,
*Clerk U. S. District Court of Porto Rico,*
By A. AGUAYO,
*Deputy Clerk.*

And afterwards, to wit, on the 8th day of May, 1906, came Santiago Oppenheimer, one of the Referees in Bankruptcy of this Court to whom the aforesaid cause was referred for further proceedings, and filed in the Clerk's office of said Court his finding and order dismissing said petition, which said finding and order is as follows, to wit:

7

*Finding and Dismissal.*

In the District Court of the United States for Porto Rico. In Bankruptcy.

In the Matter of EDUARDO FERNANDEZ ET AL.,
*vs.*
PASCASIO ALVARADO.

Hearing of Involuntary Petition.

Motion for Dismissal.

A petition for adjudication in bankruptcy of Pascasio Alvarado was filed with the Clerk of the Court on March 29, 1906, at 1 P. M. by Eduardo Fernandez, Juan Bautista Pacheco and Genara Jusino, all of Juana Diaz, Porto Rico.

Said petition was referred to the undersigned, one of the Referees in Bankruptcy of this Court, in the absence of the Judge, for consideration and to take such action and proceedings therein as are required by the provisions of the Acts of Congress relating to bankruptcy, on the 24th day of April, 1906, and the said Pascasio Alvarado was ordered to attend at the office of the aforesaid Referee at 10 o'clock A. M. on the 28th day of April, A. D. 1906.

The aforesaid petition reads as follows:

"In the District Court of the United States for Porto Rico.

"To the Honorable Chas. F. McKenna, Judge of the Above Said Court:

8 "The petition of Eduardo Fernandez and Juan Bautista "Pacheco and Genara Jusino, all residing in Juana Diaz, "P. R. respectfully shows:

" That Pascasio Alvarado of Juana Diaz has for the greater part " of six months next preceding the date of filing this petition, had " his principal place of business at Juana Diaz, Puerto Rico, and owes " debts to the amount of one thousand dollars ($1,000).

" That your petitioners are creditors of said Pascasio Alvarado " having provable claims amounting in the aggregate, in excess of " securities held by them, to the sum of $500.00.

" That the nature and amount of your petitioners' claims are as " follows:

*"Claim of Eduardo Fernandez.*

" Account current for goods supplied at various dates up " to February 10th, 1906..... $1,182.53

*"Claim of Juan Bautista Pacheco.*

" Account current, various dates up to March 7, 1906... $19.60

*"Claim of Genara Jusino.*

" Account current; various dates up to April 15, 1906.. $396.60

"And your petitioners further represent that said Pascasio Al- " varado is insolvent, and that within four months next preceding " the date of this petition the said Pascasio Alvarado committed an " act of bankruptcy, in that he did heretofore, to wit, on the 28th day " of February, A. D. 1906, permit and suffer several of his creditors, " to wit Alberto Armstrong *et al.* to secure an advantage through legal

" proceedings over his creditors in that he suffered and per-
9 " mitted the said — to attach all of his properties and inter-
" est real and personal by virtue of a writ of *fieri-facias* issued " out of the United States District Court for Porto Rico on January " 20th, 1906, on a judgment rendered in the above said Court on " the January Term A. D. 1906 in favor of the said Alberto Arm- " strong *et al.* and against the said Pascasio Alvarado.

"And your petitioners further represent that within four months " next preceding the date of this petition, the said Pascasio Alvarado " did commit other act of bankruptcy in that he did heretofore, to " wit, on the 14th day of March, 1906, in a letter addressed to " Eduardo Fernandez, one of the petitioners, admit his inability to " pay his debts and his willingness to be adjudged a bankrupt on " that ground.

" Wherefore your petitioners pray that service of this petition with " a subpœna may be made upon said Pascasio Alvarado as provided

"in the Acts of Congress relating to bankruptcy, and that he may "be adjudged by the Court to be a bankrupt within the purview of "said Acts.

("Signed) J. B. PACHECO.
(" " ) EDUARDO FERNANDEZ.
(" " ) GENARA JUSINO.

"(Signed) N. R. CANALES, *Attorney.*

"UNITED STATES OF AMERICA, *District of Porto Rico:*

"Eduardo Fernandez, Juan Bautista Pacheco and Genara Jusino, "being three of the petitioners above named, do hereby make a "solemn oath that the statements contained in the foregoing peti- "tion, subscribed by them, are true.

"Before me Pedro Monclova this 28th day of March, 1906.

"(Signed) PEDRO MONCLOVA.
*"Justice of the Peace."*

10 A hearing in this matter was held at the office of the undersigned on the day aforesaid, to wit, the 28th day of April, 1906, at which were present:

Alejandro Alvarado, attorney in fact for Pascasio Alvarado.

N. R. Canales, attorney for petitioning creditors.

H. P. Leake, of Pettingill & Leake, attorneys for Alberto Armstrong *et al.*

W. Vincent Robbins, representing the American Shoe Export Company of New York.

Mr. Leake submitted to the undersigned Referee the following motion, to wit:

"In the District Court of the United States for Porto Rico. In Bankruptcy.

"*In re* PASCASIO ALVARADO, Bankrupt.

"Now comes Alberto Armstrong y Pou, liquidator of Boysen & "Company, a firm in liquidation, creditors of the said Pascasio Al- "varado, and by his attorneys, Pettingill & Leake, move the Referee, "in the absence of the Judge, to dismiss the petition of Eduardo "Fernandez, Juan B. Pacheco, Genara Jusino, praying that Pascasio "Alvarado be adjudged a bankrupt, for the reason that the same is "lacking in form and substance in compliance with the requirements "of law in that the verification of said petition is defective as it "shows no venue, the Court not acquiring jurisdiction of said bank- "ruptcy case.

"ALBERTO ARMSTRONG Y POU,
*Liquidator,*

"(Signed) By PETTINGILL & LEAKE,
*"His Attorneys.*

"April 28, 1906."

Mr. Robbins joined in the motion for dismissal of the petition. Mr. Leake cited in support of his motion sub-section 4 of Section 18 of the Bankruptcy Act and Section 20 of said Act.

He further cited as authority *in re* Brumelkamp (95
11 Federal Reporter, page 114) in which Judge Coxe of the Northern District of New York confirmed the finding of a Referee in a similar case.

The motion was argued by counsel *in extenso,* Mr. Canales opposing it and asking for leave to amend.

After a careful consideration of the case, the undersigned Referee hands down the following:

*Opinion.*

This is a case in which the petition in an involuntary bankruptcy case is impugned because of defect in form of same, as it does not show where the verification of the petition was made.

There can be no question as to the defect, as there is no such official as Justice of the Peace of the *District of Puerto Rico.*

Counsel for the petitioners contends that he can be allowed to amend the petition.

Now the Bankruptcy Act in Section 18, Sub-sections (*d*) (*e*), provides a statutory time for pleading and if none are made on the last day within which same can be made the adjudication must be made or the petition dismissed.

Counsel for the petitioners argued that the last paragraph in Collier page 217 reading as follows:

"Where the answer is multifarious and in response to a multi-
"farious petition, leave will be granted to amend and file as of the
"day *of* the original petition was filed"

applied to this case.

The undersigned, however, takes a different view of the matter, as there is no answer involved in the case before him and he is inclined to think that this case comes under sub-sections (*e*)
12 and (*f*) of Section 18 referring to defaults.

While leave to amend could have been granted and application for same been made within the statutory time, the latter having expired no such amendment can be allowed as the same act of bankruptcy could not be alleged as it would not be a true statement of the facts.

Wherefore the undersigned Referee finds that the petition aforesaid ought to be, and is hereby, dismissed with costs to the petitioners.

Thus done and ordered at Ponce, P. R., on the 8th day of May, 1906.

S. OPPENHEIMER,
*Referee in Bankruptcy.*

And afterwards, to wit, July 7th, 1906, the Referee in Bankruptcy herein filed in the Clerk's office of this Court an order setting aside

his order heretofore made dismissing the petition in this case and which said order is as follows, to wit:

*Order.*

In the United States District Court for Porto Rico.

In the Matter of PASCASIO ALVARADO.

Petition in Bankruptcy.

A motion for a rehearing having been granted, and after hearing Attorneys Canales, for the petitioning creditors, and Robbins, for the New York Shoe Export Company, and after due consideration, it is hereby ordered that the order dismissing the petition be, and hereby is, set aside, and it is further ordered that the petition may be amended so as to show the venue of the verification.

S. OPPENHEIMER,
*Referee in Bankruptcy.*

Ponce, P. R., July 6, 1906.

And on the 16th day of July, 1906, came Alberto Armstrong and other creditors of Pascasio Alvarado by their attorneys
13 Pettingill & Leake and filed in the Clerk's office of said Court a motion to set aside the order of the Referee dated July 6th, 1906, which said motion is as follows:

*Motion.*

In the District Court of the United States for Porto Rico.

*In re* PASCASIO ALVARADO, B'kr'pt.

Involuntary Bankruptcy.

To the Honorable Judge of the District Court of the United States for Porto Rico:

Now come Pettingill and Leake, attorneys for Alberto Armstrong and others, creditors of the above named Pascasio Alvarado, and move the Court to annul and set aside the order made herein by the Referee, Santiago Oppenheimer, Esq., on July 6th, for the reason that the same is without authority in law.

PETTINGILL & LEAKE,
*Attorneys for Alberto Armstrong et al.*

And on the same day and year last aforesaid an entry was made upon the Journal of said Court in said cause, which said entry is as follows, to-wit:

*Entry.*

Bankruptcy No. 11.

FERNANDEZ ET AL.
*vs.*
PASCASIO ALVARADO.

This matter came on to be heard on the petition of Alberto Armstrong *et al.* as opposing creditors to the adjudication of the defendant as a bankrupt for an order setting aside the order of the Referee by which he sets aside a former order made by him dismissing the petition in bankruptcy. Upon consideration of said motion
14 it is denied and the petitioning creditors are given until 10 A. M. of the 18th inst. to amend their petition in so far as the defect of verification is concerned. The order of reference is set aside and the case ordered back to Court for further proceedings, to which opposing creditors by their counsel except.

And on the 17th day of July, A. D. 1906, came the petitioning creditors by their attorney N. R. Canales and amended the petition heretofore filed herein by inserting after the words "Justice of the Peace" at the end of said petition the words "of Juana Diaz, Porto Rico," and also the following words, to wit:—

" The foregoing verification has been amended by leave of Court " inserting the words "Juana Diaz, Puerto Rico."—Pedro Mon- " clova,—Justice of the Peace of Juana Diaz, P. R.—Subscribed be- " fore me this the 17th day of July, 1906.—A. Aguayo, D. C.

And afterwards, to wit, July 18th, 1906, came Alberto Armstrong, etc., *et al.*, by their attorneys Pettingill & Leake and filed in the Clerk's office of the Court aforesaid a motion to dismiss the petition of the petitioning creditors as amended, which said motion is as follows, to wit:

***Motion.***

In the District Court of the United States for Porto Rico.

*In re* PASCASIO ALVARADO.

Involuntary Petition in Bankruptcy.

Now come Pettingill & Leake, Attorneys for Alberto Armstrong y Pou, liquidator of Boysen & Company *et al.*, creditors of the alleged bankrupt, Pascasio Alvarado, and move to dismiss the petition of the petitioning creditors (as amended) for the reason (1) that the same was not filed in duplicate, as required by the Act of

Bankruptcy, and (2) that the jurisdictional averment that
15 the alleged bankrupt does not come within the excepted classes of persons who may not be declared bankrupt, as provided by said Bankrupt Act, is not made.

Wherefore, petitioners pray the Court to dismiss said petition with costs against the petitioning creditors.

PETTINGILL & LEAKE,
*Attorneys for Alberto Armstrong y Pou, Liq., et al., Creditors.*

Thereupon an order was made and entered upon the Journal of said Court in said cause, which said entry is as follows, to wit:

*Entry.*

Bankruptcy No. 11.

FERNANDEZ ET AL.
*vs.*
PASCASIO ALVARADO.

Now come Alberto Armstrong *et al.*, creditors opposing the adjudication herein and file a motion to dismiss the petition and upon consideration thereof and after hearing N. R. Canales in opposition to said motion and N. B. K. Pettingill in support thereof, said motion is overruled, to which ruling said opposing creditors by their counsel except.

And on the same day and year last aforesaid an entry was made upon the Journal of said Court in said cause, which said entry is as follows, to wit:

*Entry.*

Bankruptcy No. 11.

FERNANDEZ ET AL.
*vs.*
PASCASIO ALVARADO.

The petitioning creditors herein are allowed to amend their petition so as to aver that the defendant is not within the classes designated in the Bankruptcy Act as being incapable of being adjudged bankrupts. The opposing creditors are given until the 19th inst., at
10 A. M. to file such pleading as they may deem proper
16 and the Court sets said matter for hearing at said time.

Thereupon came N. R. Canales, attorney for the petitioning creditors herein, and amends the petition heretofore filed herein by inserting after the words "That Pascasio Alvarado" at the beginning of said petition, the words following, to wit:

"Who is not a wage earner nor a person engaged chiefly in farm-
"ing or the tillage of the soil, and who is chiefly engaged in com-
"mercial business."

And on the 19th day of July, 1906, came Alberto Armstrong and others, opposing creditors, by Pettingill and Leake their attorneys, and filed in the Clerk's office of the Court aforesaid an answer in this cause, which answer is as follows, to wit:

*Answer.*

In the District Court of the United States for Porto Rico.

*In re* PASCASIO ALVARADO. In Bankruptcy.

AT PONCE, DISTRICT OF PORTO RICO, *July 19th*, 1906.

And now come Alberto Armstrong y Pou *et al.*, creditors of the alleged bankrupt, Pascasio Alvarado, and deny the allegations of the involuntary petition that the alleged bankrupt does not come within the excepted classes of the Bankruptcy Act, and that he has committed the acts of bankruptcy therein alleged; and this they pray may be inquired of by the Court.

ALBERTO ARMSTRONG Y POU
AND OTHERS,
*Creditors Opposing,*
By PETTINGILL & LEAKE,
*Their Attorneys.*

And on the same day and year last aforesaid an entry was made upon the Journal of said Court in said cause, which said entry is as follows, to wit:—

17 *Entry, July* 19, 1906.

FERNANDEZ ET AL.
*vs.*
PASCASIO ALVARADO.

Involuntary Bankruptcy.

Now come the opposing creditors, Armstrong *et al.*, and file an answer to the petition herein denying that the defendant is not a farmer or that he has committed the acts of bankruptcy alleged.

Whereupon the Court hears the testimony of the petitioning creditors, Fernandez *et al.*, upon the issue raised by said answer.

Thereupon counsel for the opposing creditors move that their answer be sustained and that the petition to have the defendant Pascasio Alvarado declared a bankrupt be denied and dismissed, which said motion is overruled, to which ruling counsel for Armstrong *et al.* except.

Thereupon the Court hears the testimony offered by the opposing creditors and at the conclusion of all the testimony overrules said answer and denial and directs that a proper order of adjudication and reference be prepared, to which counsel for Armstrong *et al.* except.

And on the same day, to wit, July 19th, 1906, an order was entered upon the record of said Court in said cause, which said order is as follows, to wit:

*Order.*

In the Matter of PASCASIO ALVARADO, Bankrupt.

In Bankruptcy.

At Ponce, in said District, on the nineteenth day of July, A. D. 1906, before the Honorable Bernard S. Rodey, Judge of said Court in Bankruptcy, the petition of Eduardo Fernandez *et al.*, that Pascasio Alvarado be adjudged a bankrupt, within the true meaning and intent of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said Pascasio Alvarado is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable Bernard S. Rodey, Judge of said Court, and the seal thereof, at Ponce, in said District, on the 19th day of July, A. D. 1906.

18 And on the same day an order was entered upon the record of said Court in said cause, which said order is as follows, to wit:

*Order.*

In the Matter of PASCASIO ALVARADO, Bankrupt.

In Bankruptcy.

Whereas, Pascasio Alvarado of Juana Diaz, in the District aforesaid, on the 19th day of July, A. D. 1906, was duly adjudged a bankrupt upon a petition filed in this Court against him on the 29th day of March, 1906, according to the provisions of the Acts of Congress relating to bankruptcy.

It is thereupon ordered that said matter be referred to Santiago Oppenheimer, one of the Referees in Bankruptcy of this Court, to take such further proceedings therein as are required by said acts; and that the said Pascasio Alvarado shall attend before said Referee on the 18th day of August at Ponce, and thenceforth shall submit to such orders as may be made by said Referee or by this Court relating to said bankruptcy.

19 Witness the Honorable Bernard S. Rodey, Judge of the said Court, and the seal thereof, at Ponce in said District, on the 19th day of July, A. D. 1906.

And on the 27th day of July A. D. 1906, came Boysen & Company, the opposing creditors in the above entitled suit, by their attorneys Pettingill & Leake, and filed in the Clerk's office of the Court aforesaid a petition of appeal and assignment of errors, which said petition and assignment of errors are as follows, to wit:

*Petition of Appeal.*

In the United States District Court for Porto Rico. In Bankruptcy.

EDUARDO FERNANDEZ ET AL.
*vs.*
PASCASIO ALVARADO.

Involuntary Bankruptcy.

Now come Boysen & Company, the opposing creditors in the above entitled suit, by their attorneys Pettingill & Leake, and enter this their appeal to the Supreme Court of the United States from the order and judgment of this Court, made and entered on the 19th day of July, A. D. 1906, whereby said Pascasio Alvarado was adjudged a bankrupt by this Court upon the issue made by these opposing creditors, and from the various orders and judgments theretofore made in the progress of said cause, as specified in the assignment of errors herewith filed. And they show to the Court that the amount of their money decree against said alleged bankrupt is $15,694.60, as appears from the records of this Court.

Your petitioners therefore pray the Court that their said appeal be allowed, that the amount of the bond necessary to be given in order that the appeal may operate as a supersedeas be fixed, and that the Court may be pleased to make and file the findings of law
20 and fact upon said issue whereby said Alvarado was adjudged a bankrupt, as required by the laws and rules of practice in bankruptcy; and that the evidence taken before this Court on said issue may be certified to said Supreme Court as a part of the record on said appeal.

PETTINGILL & LEAKE,
*Attorneys for said Opposing Creditors.*

*Assignment of Errors.*

In the United States District Court for Porto Rico.

EDUARDO FERNANDEZ ET AL.
*vs.*
PASCASIO ALVARADO.

Involuntary Bankruptcy.

Now comes Alberto Armstrong y Pou, as liquidator of the firm of Boysen & Company, creditors opposing the petition to declare said Pascasio Alvarado a bankrupt in said cause, by Pettingill & Leake, his attorneys, and assigns the following as the errors committed by this Court in the course of the proceedings in said cause, to wit:

First, that the Referee in Bankruptcy erred in granting a rehearing to the petitioning creditors by his order of July 6, 1906, after he

had made an order dismissing their said petition upon the motion of these opposing creditors and had returned and filed said order together with all other papers in the case with the Clerk of this Court.

Second, that this Court erred in refusing by its order of July 6, 1906, to grant the motion of these opposing creditors to annul and set aside said order of said Referee in Bankruptcy of July 6, 1906, aforesaid.

Third, that this Court erred in overruling the motion of
21 these opposing creditors filed on July 18th, 1906, to dismiss the petition of the petitioning creditors.

Fourth, that this Court erred in finding from the evidence offered before the Court on the 19th day of July, 1906, upon the issue between said petitioning creditors and these opposing creditors, that said Pascasio Alvarado should be adjudged a bankrupt and in so adjudging him by its order of that date.

PETTINGILL & LEAKE,
*Attorneys for Opposing Creditors.*

And afterwards, to wit, on the 28th day of July, 1906, an order was entered upon the Order Book of said Court in said cause, which said order is as follows, to wit:

*Order Allowing Appeal.*

In the United States District Court for Porto Rico.

EDUARDO FERNANDEZ ET AL.
*vs.*
PASCASIO ALVARADO.

Involuntary Bankruptcy.

The petition of appeal in behalf of Boysen & Company, creditors who opposed the adjudication made by this Court on the 19th day of July instant, coming on now for hearing, and it appearing to the Court that the claim of said opposing creditors largely exceeds the sum of Five Thousand Dollars, it is hereby ordered that said appeal be allowed, the same to act as a supersedeas upon the filing of a bond conditioned as required by law in such cases in the penal sum of Twenty-five Hundred Dollars; and that the evidence taken by the official stenographer of this Court at the hearing of said cause of bankruptcy be reported to the Court and certified as the evidence considered upon said issue.

And this Court will, in accordance with the prayer of said
22 petitioner, file in this cause as soon as practicable its findings of fact and of law as provided in the statute for such cases.

Done and ordered in open court at San Juan this 28th day of July, 1906.

B. S. RODEY, *Judge.*

And afterwards, to wit, on the 18th day of August, A. D. 1906 came N. B. K. Pettingill, as attorney for Boysen & Company, opposing creditors in this cause, and filed in the Clerk's office of the aforesaid Court, an appeal bond duly approved by said Court, which said bond is as follows, to wit:

In the United States District Court for Porto Rico.

EDUARDO FERNANDEZ ET AL.
*vs.*
PASCASIO ALVARADO.

Involuntary Bankruptcy.

*Appeal Bond.*

Know all men by these presents, that we, N. B. K. Pettingill as attorney for Boysen & Company, opposing creditors in the above proceeding, as principal, and John A. Wilson and R. H. Todd as sureties, are hereby held and firmly bound unto the said Eduardo Fernandez, Juan Bautista Pacheco and Genara Jusino, petitioning creditors therein, their attorneys, executors, administrators or assigns, in the penal sum of Twenty-five Hundred Dollars ($2500), to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 17th day of August, A. D. 1906.

Whereas lately at a session of said United States District Court for Porto Rico, sitting in Bankruptcy, in a suit pending therein
23 by said Eduardo Fernandez, Juan Bautista Pacheco and Genara Jusino against said Pascasio Alvarado to have him declared an involuntary bankrupt, the said Boysen & Company opposed such declaration; and whereas said Boysen & Company have obtained from said Court an order allowing an appeal to the Supreme Court of the United States to reverse the decree aforesaid, and a citation directed to said Eduardo Fernandez, Juan Bautista Pacheco and Genara Jusino is about to be issued citing and admonishing them to be and appear before said Supreme Court at Washington:

Now therefore the condition of the above obligation is such that if the said Boysen & Company shall prosecute their said appeal to effect and shall answer all damages and costs that may be awarded against them, if they fail to make their plea good, then the above obligation is to be void; else to remain in full force and virtue.

N. B. K. PETTINGILL. [SEAL.]
JOHN A. WILSON. [SEAL.]
R. H. TODD. [SEAL.]

UNITED STATES OF AMERICA, *District of Porto Rico:*

John A. Wilson and R. H. Todd, being severally duly sworn depose and say, each for himself, that he is worth more than the sum of Twenty-five Hundred Dollars in visible property within the District of Porto Rico subject to levy under execution over and above all debts and legal liabilities.

(Signed) JOHN A. WILSON.
R. H. TODD.

Sworn to and subscribed before me this 17th day of August, 1906.
H. H. SCOVILLE, *Clerk.*

The above bond is approved by me this 17th day of August, 1906.
(Signed) B. S. RODEY, *Judge.*

24 In the District Court of the United States for Porto Rico, Sitting at Ponce.

(Filed August 14, 1906.)

*Nunc Pro Tunc* for July 19, 1906.

Involuntary Bankruptcy. No. —.

FERNANDEZ ET AL.
*vs.*
PASCASIO ALVARADO.

Findings of fact and conclusions of law made by the Court for transmission to the Supreme Court of the United States, under the Rule in that regard, on the appeal of Alberto Armstrong *et al.*, opposing creditors, from the action of the Court in declaring Pascasio Alvarado a bankrupt, at the petition of Fernandez *et al.*

On July 19, 1906, when the present incumbent of this bench held his first term of court at Ponce in this District, the above entitled matter came on for hearing, and it developed that the petition for involuntary bankruptcy had theretofore been duly filed and sent out to the Referee, who, it appears, had first dismissed the petition for informality as to the verification thereof, but thereafter rescinded his order in that regard and permitted the petition to stand. On this state of affairs, Armstrong & Company, in open court, moved that the petition be dismissed for improper verification, in accordance with the first action of the Referee. Other creditors resisted this motion. The Court thereupon entered an order recalling the matter from the hands of the Referee, and in open court permitted the verification *nunc pro tunc* to be corrected and the petition to be considered as filed, as thus amended. Then the question as to whether or not the defendant was a person, "engaged chiefly in agriculture or the tillage

of the soil" was raised by Armstrong & Co., and on the de-
25 cision of which would depend the right of the Court to declare him a bankrupt at all. On this question, the Court gave the parties opportunity to procure evidence, and set the case down for a succeeding day for that purpose, and did, at the time fixed, hear evidence pro and con on the subject. From the evidence thus adduced, the following facts appear:

That Pascasio Alvarado is now a feeble old man living at Juana Diaz near said Ponce with his sons, one of whom conducts his business, which it appears is being wound up; that for more than twenty-five years last past he has been engaged in conducting a large mercantile business at said place, and that he kept a stock of goods ranging from twenty-five thousand dollars upwards, continuously, and was well known to the wholesale merchants of Europe, and perhaps of the United States; that during the last two years he has been, or at least his sons for him, have been engaged in selling out the remainder of his stock of goods, and in endeavoring to collect the debts belonging to the estate, in cash and in coffee and other products; that at the time the business was put into liquidation and this son took charge of it, and since, the estate was in possession, or quasi possession, of several pieces of land under mortgage, which it collected payments from in the way of portions of the coffee and other crops raised, and perhaps the estate was the absolute owner of some small portion of land itself, on which some coffee is raised. Most of the evidence thus taken is transmitted herewith, duly certified. The Court, of course, had the benefit of the full record of the case and of the arguments of counsel and statements made in open court at the time.

26 The Court held on this evidence, that the defendant was not a "wage earner or a person chiefly engaged in the tillage of the soil," but that he was, and is, a merchant, and that all the debts he owes, were created as a merchant, and that he could, therefore, be declared a bankrupt, and so held. From this action of the Court, Armstrong & Co., who have some attachment or other liens on some of his estate, not four months old at the time of the filing of the petition, have appealed.

This finding of fact and this conclusion of law, we conceive to be a complete compliance with the Rule of the Supreme Court of the United States as to what this Court must certify to in the premises.

All of which is respectfully submitted.

B. S. RODEY,
*Judge of the District Court of the United States for Porto Rico.*

27 In the District Court of the United States for Porto Rico.

FERNANDEZ ET AL.,
*vs.*
PASCASIO ALVARADO.

Involuntary Bankruptcy.

*Transcript of Testimony Taken Before the Court, July* 19, 1906.

Q. What is your name?
A. Alejandro Alvarado.
Q. Where do you reside?
A. At Juana Diaz.
Q. Do you know Pascasio Alvarado?
A. Yes sir; he is my father.
Q. What is your own occupation?
A. Attorney in fact of Pascasio Alvarado.
Q. So you are attorney in fact of Pascasio Alvarado?
A. Yes sir.
Q. What kind of business is he engaged in?
A. We have an office open in Juana Diaz in Sol Street engaged in the liquidation of the commercial firm.

The COURT:

Q. Are you still doing business as merchants?
A. Yes sir.
Q. Buying and selling goods?
A. Yes, sir; the stock on hand we are now selling it off.
Q. What does your father do apart from that?
A. In view of the fact that my father is an old man, he stays at home.

Mr. CANALS:

Q. Besides the articles remaining from the old house do you still buy and sell new articles?
A. Yes, sir; coffee when the crop is gathered; tobacco.
The COURT: Have you got a ranch or estate there that you cultivate as part of the estate of your father?
A. We have properties which we have acquired during our business life.
Q. The annual income that comes from that, is that more than you get out of the goods; which is largest?
28 A. Neither one thing or the other yields enough. Every penny or cent earned is devoted to paying off debts and expenses. All those properties are subject to liens and the proceeds of them are devoted to paying them off or raising them.
Q. So the net income from those fincas would be enough to pay the interest?

Mr. LEAKE: We object to that. The net income is not the standard.

The COURT: It is going to the Court.

The COURT:

Q. What does the most income come from in your business now, from the sale of goods there or from any profit that may be derived from these fincas even though you have to pay it out to pay debts?

A. At the present time all the products of the property like coffee are sold for the purpose of paying off the indebtedness on the property.

Q. How many years had your father been in business there?

A. Over fifty years.

Q. How big a stock of goods did you have on hand about the latter part of last year?

A. Over a thousand dollars of stock; a thousand and a fraction.

Q. Did you have a lot of old accounts out that you were collecting?

A. Yes sir; and still have.

Q. Did they amount to a small sum or large sum?

A. A large sum.

Q. How many acres has your father's estate got in it?

A. About 1455 acres.

Q. How large a stock of goods did your father sometimes keep in this place of business? I want to find out how large a merchant he was or how small a merchant he was.

A. You mean before the cyclone was?

Q. In recent years. You say he has been in business there fifty years. How big a stock of goods did he keep on hand?

A. Year after year the stock amounted to twenty-five to thirty thousand dollars.

Q. Did your father stay in that store tending to it all the time?

29 A. Yes sir.

Q. In years before he got in debt which was his biggest business the coffee farm or the mercantile business?

A. The commercial firm.

Q. How many clerks did he sometimes keep?

A. Always about five clerks.

Q. Did your father ever do anything on the farm in the cultivating of it or anything?

A. The properties represent mortgages which we held, representing money that we loaned to customers, money, provisions, etc. After the cyclone we had to take under our charge these properties.

Mr. CANALS:

Q. Do you depend now principally, mainly, to live upon your fincas or upon your business?

A. We depend on the little business that we do; purchase and sale of goods, merchandise. The properties don't yield enough.

Mr. LEAKE: If you depend principally on your business, how is it that you are in liquidation?

A. We are collecting the accounts in favor of Pascasio Alvarado in order to pay the indebtedness.

Q. Precisely; but didn't you just testify that you had those accounts and still have them and that they are not good?

A. Yes, sir.

Q. Then you do not get any revenue from those old accounts of the old merchandise do you?

A. At present it happens that I am instituting proceedings in Coamo. Mr. Rivera is my attorney for the purpose of collecting those accounts.

Q. What other merchandise business do you carry on except collecting old accounts by legal process?

A. Some hardware that is still remaining and which I am gradually or slowly selling out.

Q. Selling out the old stock; getting rid of it?

A. Whatever remained of the firm business.

Q. You have testified that the stock of goods on hand last year was a thousand dollars.

A. Yes, sir; and I have been making sales to Mr. Rodriguez, etc.

30 The COURT:

Q. Ask him how the fruit lands are held. How are they held by the different tenants that are in them?

A. Partidario contracts; the parties have been placed in charge of them for the purpose of taking care of them and gathering the crops and they are paid salaries from the proceeds of the crops.

Q. They get a share of the crop?

A. Of some of the properties, because in other cases the owners themselves, upon which we hold mortgages, take care of them.

Q. But where the title is in his father's estate he gives the tenants part of the crops for taking care of them?

A. Yes, sir.

Q. You have nothing to do with those that you have a mortgage on except to look out for the interest?

A. Absolutely nothing except the collection of the amount.

Q. When you counted up this ranch property a moment ago did you include the mortgage property in that?

A. Yes, sir.

Mr. LEAKE:

Q. As "apoderado general" of your father you collect rents and get the proceeds from these fincas?

A. As to leases we had nothing to do with them absolutely. The fruits of the fincas, those in charge of them bring the crops every year and the proceeds of the sale of that stuff is what is devoted to the payment.

Q. In addition to paying off the taxes and the support of your father's family and your own family, what other payments have you made from the revenue derived from these fincas?

A. As to payments I might say that we have made almost none

because on account of the law suit of Mrs. Boison all of the same amounts have vanished in the payment of attorney's fees and everything has gone off in expenses. My father at the present time lives on the help of his sons. There are three of us and that is why my desire is that all my creditors should be paid with whatever there is at present, that neither one of them should benefit to the prejudice of the others.

Mr. CANALS:

Q. Have you ever issued circulars to the world relating to the termination of the business of the house?

A. No, sir; inasmuch as I am still liquidating.

Q. Isn't that the custom among the merchants?

31 A. That is compulsory.

Q. Do you keep books actually? Are you still keeping books?

A. Yes, sir.

Q. Do those fincas appear in your books?

A. Yes, sir; as debtors all of them.

Q. And you have an account for each of them?

A. Yes, sir; they are debtors of Pascasio Alvarado.

Q. Do you pay taxes as a merchant?

A. Yes, sir.

Q. Besides selling the old stock from the old house do you have any other sales?

A. Yes, I sell what is left and the coffee that I receive.

The COURT:

Q. Do you get any coffee other than on your own land or that that is mortgaged to you?

A. Yes, sir; customers who are indebted to me and pay me in coffee.

Q. Had they paid you in anything else?

A. In tobacco.

Q. How much coffee and tobacco do you get that you don't receive from your own ranches?

A. Very little; 30, 40 or 50 quintals.

Q. During the course of a season?

A. Yes, sir; in December and January.

Q. When did your father quit active business himself?

A. At the end of the year before last.

Q. And for fifty years before that he had been a merchant with twenty-five to thirty thousand dollars worth of stock in that town?

A. Yes, sir; and for more than that too on certain occasions.

Q. And he never owned any land much until the last four or five years?

A. Yes, sir; he had also a cattle ranch; a piece of property devoted to the raising of cattle.

Q. Is the estate devoted to the raising of cattle now?

32 A. No, not now; that was in connection with the commercial firm.

Q. In recent years where did you buy the goods, here or in the United States?

A. In Europe and in the Island. All Europe was acquainted with the firm in those years of Alvarado.

Mr. LEAKE:

Q. When was the last time you sold cattle from the finca?

A. Unless my memory fails, it was in 1903 or 4.

The COURT:

Q. Let us be sure about the quantity of land that you are getting revenue from now. Don't count that which you have mortgages on. Count that which you own and have in the hands of agents. How many cuerdas? He must have reckoned it up many times. Tell us about how many. A thousand or two thousand or five hundred, more or less, if he has never reckoned it up.

A. There are several of them. There are small tracts of land here and there. With the exception of those two tracts, one measuring 700 and the 200, those are not ours. We have been compelled to turn them over to the heirs of the creditors of my father.

Q. You never did own those then?

A. Yes, sir; we formerly owned them but the credits were guaranteed with them. The heirs instituted a proceeding in the District Court and the District Court ordered that we turn over the property.

Q. You have got four or five hundred acres of land apart from that?

A. Yes, sir; more or less.

Mr. CANALS:

Q. Has any part of that land been acquired by direct purchase or do those fincas only represent old accounts of the house? (not answered)

The COURT:

Q. Did he buy any of that land direct or did he get it all on debts?

A. With the exception of the 900 all of them.

The COURT:

Q. But the 900 you haven't got at all.

A. Those were purchased by us many years ago. We devoted them to the raising of cattle. That was part of our business.

Q. Have you got the 900 acres yet?

A. No, sir.

Q. You have got the difference between 900 and 1400?

33 A. Those that belong to the owners of the property upon which we hold mortgages.

Q. But how much have you that you own yourself that you had to take in payment of debts?

A. In payment of accounts we have only one measuring 62 and or. 184. The others are represented by mortgages.

Q. That is about 246 acres of land that your father's estate owns and no more?
A. Yes, sir.
Q. Now the balance that you have got you simply hold a mortgage on?
A. Yes, sir.
Q. Then you only get rent or interest on your mortgage out of that?
A. Yes, they are making partial payments.
Q. What did you mention twelve or fourteen hundred acres of land awhile ago for?
A. Who added it to 1400?
Q. You called it off and the Court added it.
A. Because I was naming them by districts.
Q. Were you naming them because you own them or because you had mortgages on them? Which?
A. Because we have mortgages on them. The owners have drawn them to us.
Q. When you speak about mortgages do you mean that another person owns the land and you hold a mortgage against them or that you hold the land and borrowed money from another on it?
A. That I have given money on the land and taken mortgages. It might be that I have omitted some piece of property. If your Honor wants me to give you exact information on the acreage I can give it.
The COURT: No, that is not necessary.

Witness retires

34 Direct Examination of Witness ANTONIO SANTI by Mr. Canals:

Q. State your name.
A. Antonio Santi.
Q. Where do you reside?
A. At Juana Diaz.
Q. Do you know Pascasio Alvarado?
A. Yes, sir.
Q. How long have you known him?
A. Some 25 years.
Q. What has always been his occupation?
A. Merchant.
Q. Is he still in business directly or by agent?
A. He is in liquidation and represented by an attorney in fact, his son, who is his attorney in fact.
Q. Have you ever had commercial relations with Pascasio Alvarado?
A. Yes, sir; on several occasions.
Q. What has been the name of his firm?
A. First Alvarado Bros. and afterwards Alvarado & Company and afterwards I think Alvarado alone.
Q. Was it a big concern?
A. Yes, sir.

Q. How long have you been knowing that house as an important house?

A. Twenty-five years, from the time that I have known him.

The COURT: Mr. Witness, do you live in that same town where Alvarado does?

A. Now for the last year or so I live in the same place. Before I lived some distance.

Q. But you have always known this gentleman?

A. Yes, sir.

Q. Why do you say he is a merchant rather than a coffee grower or farmer now? Why do you say that?

A. For that reason, because I have always seen him engaged in that business.

Q. What business is he in now?

A. The same way. He is in liquidation now.

Q. Has he always been in the same house or the same place of business?

A. He opened up another house in Sol Street.

35 Q. Do you know how much land he has of coffee, sugar or tobacco?

A. He has a number of properties but I don't know the amount.

Q. You don't know anything about his business save in a general way?

A. No, sir.

Q. Does he do any farming now, any cultivating of land, the old gentleman himself or by his agents?

A. No, sir; I don't think so because I always see him around.

Mr. LEAKE:

Q. Mr. Santi, when you say Pascasio is a merchant, you say it because, he has been a merchant up there, don't you?

A. Because I have also purchased from him. I have also been a merchant and made purchases of him.

Q. But since he moved out of the other store he has not done much business, has he?

A. No, because I also retired from business.

Q. Do you know how much stock he has in this new house?

A. I don't know; I am not sure.

Q. Do you know how many 'fincas rusticas' he controls?

A. I don't know for a fact. I know he has a number of them.

Mr. CANALS:

Q. What is the kind of stock that he has got in a general way?

A. I have stepped in once during the coffee season and saw there some bags of coffee.

Q. Have you been there lately?

A. Yes, recently I was in these and saw there a certain amount of tobacco.

Q. A great amount or small amount?

A. A small amount.

Witness retires.

At this point Counsel for Armstrong *et al.* moved for judgment declaring Alvarado a farmer which was denied, and thereupon they called as a witness Mr. ANGEL FRANCESCHI.

36 Direct Examination of Witness ANGEL FRANCESCHI called by Mr. Leake:

Q. What is your name, Mr. Franceschi?
A. Angel Franceschi.
Q. You live in Juana Diaz, do you?
A. Yes, sir.
Q. Do you know Don Pascasio Alvarado?
A. Yes, sir.
Q. How long have you known him?
A. Forty years; a long time.
Q. Do you know then that Don Pascasio has been a merchant in Juana Diaz?
A. Yes, sir.
Q. Up to about what time did he actively engage in mercantile business in Juana Diaz?
A. Until recently. I don't know whether it was until two years ago; something like that.
Q. Is he now in Juana Diaz in his 'calidad re propietario ó comerciante'?
A. He was a merchant and property holder.
Q. But now today what is he principally?
A. He is not engaging in any business today. He is an old, feeble man and is home all the time.
Q. But he owns property doesn't he?
A. Yes, sir.
Q. He was pretty well known around there in Juana Diaz as a man who was pretty well off and owned a considerable number of properties?
A. Yes, sir.

(No cross Examination)
Witness retires.

37 Testimony of Witness ALEJANDRO ALVARADO re-called by the Court:

The COURT:

Q. Mr. Alvarado, does your father's estate produce anything else except coffee and that sort of thing? Does it raise any cattle or vegetables or anything of that kind?
A. Coffee only.
Q. Do you cultivate any tract yourself by paying the laborers actual wages for cultivating any part of these lands that you own?
A. No, sir; not personally.
Q. And don't you raise any cattle at all? Haven't you any cattle on these lands?
A. We had, but not at present.

Q. Not now?
A. Not now.
Q. You are pretty well acquainted with your father's estate, aren't you, generally?
A. Yes, sir; all of them.
Q. When were the most of his debts created? When he was actually engaged in business or after he quit?
A. When he was engaged in business. It was afterwards that we began to give guarantees.
Q. You mean to get guarantees.
A. We gave guarantees, that is, to those people whom we owed.
Q. Can't you give the Court an idea of how much stuff you get in a season from these properties that you get it from; in all, in gross, how much do you get in a season?
A. Last year all it yielded was something like fifty quintals of coffee; between fifty and sixty.
Q. What else do you get besides coffee?
A. Nothing else.
Q. Between fifty and sixty quintals of coffee was all you got from your father's estate last year, from the land?
A. Of two properties only last year.
Q. Why didn't you get some from the others?
A. Because as we only hold mortgages on them the owners kept the products.
38 Q. They didn't pay you anything?
A. They have not paid anything on account.
Q. Then you get little or nothing from all these lands that your father had?
A. Very little.
Q. Do you collect much of anything from the old debts?
A. We haven't collected anything. It is all at a standstill.

The COURT: What have you got attached, Mr. Leake?
Mr. LEAKE: A tract of 184 cuerdas and one of 35 and a warehouse in Juana Diaz.

Q. Didn't you get the product of the land last year that Armstrong & Company have got attached
A. Yes, sir.
Q. Is that part of the fifty or sixty quintals?
A. Yes, sir.

Mr. LEAKE:

Q. These fincas that you spoke about that you cannot get the products from because you only hold the mortgages, is it not a fact that the mortgages were given by Don Pascasio to his family, that you are the mortgagees?
A. They are in the name of my father.
Q. Didn't his father give these mortgages that he is talking about to him and other brothers all around?
A. Of the 700 cuerdas, it was a legal mortgage by inheritance

of one of the wives. My father was married four times. The heirs of one of the wives, five heirs, had that inheritance guaranteed.

Mr. LEAKE:

Q. That mortgage was never foreclosed?
A. Yes, sir.
Q. When?
A. Year before last.
Q. Precisely, after this equity suit was filed.
A. Before this suit was filed.
Q. How long ago was it when you made the execution of the mortgage?
39 A. The latter part of the year before last, I think it was, in the District Court.

Mr. LEAKE: We will show by the record that this equity suit has been here for nearly three years.

Q. Don't you get some bananas from these estates?
A. No, sir; they are only devoted to pasture ground.
Q. On the pasture ground have you any cattle?
A. No.
Q. When was the last time you had cattle?
A. Year before last we sold the balance to Mr. Manuel Gonzalez of Salinas.
Q. How much was that balance?
A. I don't remember but the books speak for themselves.
Q. If you were the "apoderado general," don't you think you ought to remember, more or less?
A. A little over a thousand dollars was the net amount. The exact amount I cannot quote because I cannot recollect it. In that same property which belonged to my father, my brother Ramon Alvarado has cattle grazing there, belonging to several individuals; some belonging to the central, some belonging to individuals here in Ponce.
Q. Didn't some belong to Don Pascasio also?
A. No, sir.

Witness retires.
(Testimony is closed.)

I, Arthur J. Harvey, Official Stenographer of the District Court of the United States for Porto Rico, say that the foregoing transcript of testimony consisting of thirteen typewritten pages is a true and correct copy of the testimony offered before the Court in the above entitled cause on the nineteenth day of July, 1906.

ARTHUR J. HARVEY,
*Official Stenographer.*

I hereby certify that the foregoing certificate of the Official Stenographer is correct.

B. S. RODEY,
*Judge of the District Court of the United States for the District of Porto Rico.*

40 In the District Court of the United States for Porto Rico.

Bankruptcy. No. 11.

EDUARDO FERNANDEZ, JUAN BAUTISTA PACHECO, and GENARA JUSINO

*vs.*

PASCASIO ALVARADO.

I, H. H. Scoville, Clerk of the District Court of the United States for Porto Rico, do hereby certify the foregoing thirty nine pages, numbered from 1 to 39, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause as the same remains on file in the office of the clerk of said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 19th day of September, A. D. 1906.

[Seal United States District Court for the District of Porto Rico.]

H. H. SCOVILLE,
*Clerk of the District Court of the United States for Porto Rico.*

41 UNITED STATES OF AMERICA, *ss:*

To Eduardo Fernandez, Juan Bautista Pacheco, and Genara Jusino, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof to answer to an appeal taken from the final order and decree of the District Court of the United States for Porto Rico, sitting as a court of Bankruptcy, declaring *at* your petition that one Pascasio Alvarado is a Bankrupt and entitled to the benefits of the Bankruptcy Law of the United States, in which appeal Alberto Armstrong, as Liquidator of the firm of Boysen & Company, is the appellant and you are the appellees, to show cause, if any there be, why the said final order and decree rendered against the opposition of said appellants, as in their said petition of appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Bernard S. Rodey, Judge of the District Court of the United States for Porto Rico, this 18th day of August, in the year of our Lord one thousand nine hundred and six.

[Seal United States District Court for the District of Porto Rico.]

B. S. RODEY,
*Judge of the District Court of the United States for Porto Rico.*

Attest:
H. H. SCOVILLE, *Clerk.*

O. K.
LEAKE.

[Endorsed:] U. S. District Court for P. R. Eduardo Fernandez *et al. vs.* Pascasio Alvarado. Involuntary Bankruptcy. Citation on Appeal. Filed Clerk's Office, United States District Court. Aug. 18, 1906. H. H. Scoville, Clerk of the Court.

Marshal's Fees, $6.00.
" expenses, $6.50. P.

42 *Return on Service Writ.*

UNITED STATES OF AMERICA, *The District of Porto Rico, ss:*

I hereby certify and return that I have served the annexed citation on the therein-named Eduardo Fernandez, Juan Bautista Pacheco and Genara Jusino by handing to and leaving a true and correct copy thereof with each of them personally at Juana Diaz in said District on the 24th day of August, A. D. 1906.

H. S. HUBBARD, *U. S. Marshal,*
By RALEIGH F. HAYDON, *Deputy.*

43 [Endorsed:] B'k'cy No. 11, Ponce. In the District Court of the United States for Porto Rico. Eduardo Fernandez *et al. vs.* Pascasio Alvarado. Transcript of Record on Appeal.

Endorsed on cover: File No. 20,387. Porto Rico D. C. U. S. Term No. 422. Alberto Armstrong, as liquidator of the firm of Boysen & Company, appellant, *vs.* Eduardo Fernandez, Juan Bautista Pacheco, and Genara Jusino. Filed October 2d, 1906. File No. 20,387.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1907.

## No. 114.

ALBERTO ARMSTRONG, AS LIQUIDATOR OF BOYSEN & COMPANY, APPELLANT,

*versus*

EDUARDO FERNANDEZ, JUAN BAUTISTA PACHECO, AND GENARA JUSINO, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

## BRIEF FOR APPELLANT.

### Statement.

This cause originated in the United States District Court for Porto Rico, so named in the act of Congress creating a civil government for that island, by the filing of an involuntary petition in bankruptcy on the part of the three appellees against one Pascasio Alvarado on the 29th day of March, 1906 (Record, p. 1). Upon the same day a subpœna issued to said Alvarado, requiring him to answer said petition on the 13th day of April following, which process was served on said Alvarado on March 30, the day follow-

ing the filing of the petition (Record, pp. 3-4). On April 24, 1906, an order was made by the clerk of the court, reciting the absence of the judge from the division of the district in which the petition had been filed "on the next day after the last day on which pleadings might have been filed," etc., and referring said petition generally to the referee in bankruptcy for that division (Record, pp. 4-5).

The referee in bankruptcy proceeded with the cause from the date of reference until the 8th day of May following, on which day he returned the papers in the cause into the clerk's office, together with a "finding and order" dismissing said petition (Record, pp. 5-8). This document concluded (page 8) with the following paragraphs:

> "While leave to amend could have been granted had application for same been made within the statutory time, the latter having expired no such amendment can be allowed, as the same act of bankruptcy could not be alleged, as it would not be a true statement of the facts.
>
> "Wherefore the undersigned referee finds that the petition aforesaid ought to be, and is hereby, dismissed with costs to the petitioners."

The case stood thus until early in July (the exact day does not appear from the record), when a motion for a rehearing was made before the referee and by him granted on July 6, and that order filed in the clerk's office the following day, July 7 (Record, p. 9), which order stated that "the order dismissing the petition be, and hereby is, set aside," and petitioners were allowed to amend their petition.

Meantime the judge of the court had come into the division of the district in question and was holding a term of the court; whereupon counsel for the same creditor on whose motion the petition had been dismissed by the referee, the present appellant, filed in the court, on the 16th day of the same July, their motion to annul and set aside the above order made by the referee on July 6 (Record, p.

9). This motion was denied by the court (Record, p. 10). The order of the referee of July 6 and the denial of our motion to set that order aside form the basis of the first two assignments of error.

As a part of the same order which denied our motion to annul the last order of the referee, the court allowed petitioners to amend their involuntary petition, set aside the order of reference, and allowed the petition to remain pending in the court for further proceedings; to which ruling we excepted. As soon as the petition was amended counsel for appellant filed another motion to dismiss (Record, pp. 10-11), which was also denied; and this ruling is the basis of the third error assigned.

The petitioning creditors then again amended their petition by negativing the exceptions contained in the statute as to occupation; whereupon the appellant, as an opposing creditor, by leave of the court filed his answer to the petition denying "the allegations of the involuntary petition that the alleged bankrupt does not come within the excepted classes of the bankruptcy act, and that he has committed the acts of bankruptcy therein alleged" (Record, p. 12). Thereupon, on the same day, a trial was had upon the petition and the denials of this answer, and the journal entry concludes: "The court, * * * at the conclusion of all the testimony overrules said answer and denial and directs that a proper order of adjudication and reference be prepared, to which counsel for Armstrong *et al.* except" (same page). Upon which finding formal orders were accordingly entered (Record, p. 13). These orders were dated July 19, 1906, and within the thirty days prescribed by General Order XXXVI (2) petition of appeal, appeal bond, and assignment of errors had been filed by appellant and an allowance of his appeal obtained from the judge (Record, pp. 14-17). In accordance with the same general order, the judge prepared certain findings of fact and conclusions of law, and of his own volition attached thereto a *verbatim* copy of the

evidence upon which he based the same (Record, pp. 17-28).

The errors assigned (Record, pp. 14-15) are as follows:

> "First, that the referee in bankruptcy erred in granting a rehearing to the petitioning creditors by his order of July 6, 1906, after he had made an order dismissing their said petition upon the motion of these opposing creditors and had returned and filed said order, together with all other papers in the case, with the clerk of this court.
>
> "Second, that this court erred in refusing by its order of July 16, 1906 (misprinted in record as July 6) to grant the motion of these opposing creditors to annul and set aside said order of said referee in bankruptcy of July 6, 1906, aforesaid.
>
> "Third, that this court erred in overruling the motion of these opposing creditors filed on July 18, 1906, to dismiss the petition of the petitioning creditors.
>
> "Fourth, that this court erred in finding from the evidence offered before the court on the 19th day of July, 1906, upon the issue between said petitioning creditors and these opposing creditors, that said Pascasio Alvarado should be adjudged a bankrupt, and in so adjudging him by its order of that date."

## ARGUMENT.

### I.

NEITHER THE REFEREE NOR THE COURT HAD ANY JURISDICTION TO REINSTATE THE CAUSE AFTER THE ORDER OF DISMISSAL MADE BY THE REFEREE ON MAY 8, 1906.

The first two assignments may be discussed together under the above proposition.

The powers and duties of the referees provided for in the bankruptcy act of 1898 (30 Stat. at Large, 543) are mostly

contained in sections 38 and 39, but in section 1, which is devoted to the "Meaning of words and phrases," it is stated in subdivision (7) that "'courts' shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee."

Next, section 18, which regulates proceedings after petitions are filed, provides with regard to the reference of involuntary petitions as follows:

> "*e*. If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.
>
> "*f*. If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee."

Then the next subdivision provides:

> "*g*. Upon the filing of a *voluntary* petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee."

It therefore appears that, while the prerequisites necessary to authorize a reference to a referee differ somewhat in the two cases, the authority of the referee, once the case is properly in his hands, is coextensive in the one case as in the other.

Let us now look at their jurisdiction as defined in section 38:

> "Referees respectively are hereby invested, subject always to a review by the judge, within the

limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of the judge from the judicial district, or the division of the district, or his sickness, or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings."

The following section (39) defines the "Duties of referees," and the subdivision which directly bears upon the present question is:

> "(7) safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, *when the cases are concluded.*" (Italics ours.)

Number 12 of the general orders in bankruptcy, issued by this court under the authority of said act, contains nothing affecting the foregoing provisions.

We therefore submit that, where a case has been referred generally to a referee, his action therein within the scope of his powers—*i. e.,* unless some question arises which the

act expressly says must be decided by the judge—carries the same force and validity as the action of the judge when there has been no reference; and that when, under the provisions of section 38, subdivision (1), the referee "considers the petition referred to him" and either "makes the adjudication" or "dismisses the petition," and thereafter, under section 39, subdivision (7), "transmits to the clerk the record * * * when the case is concluded," the order of dismissal is as authoritative and final as though made by the judge himself.

This is made still clearer by the provisions of section 42:

> "*a.* The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.
>
> "*b.* A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.
>
> "*c.* The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court."

There is no suggestion that the judge is to revise them, or that they differ in any respect as to the finality of disposition from other court records. And the authorities support our position.

> Neustadter *et al. vs.* Chicago, etc., Co., 96 Fed. Rep., 830.
>
> *In re* T. L. Kelly Dry Goods Co., 102 Fed. Rep., 747.
>
> *In re* Rosenburg, 116 Fed. Rep., 402.

The act does of course provide a method for obtaining a review of the actions and rulings of referees, a right which is indicated by the clause in the first sentence of section 38—

"subject always to a review by the judge"—and the proceeding for that purpose has been determined by the general order No. 27 of this court:

> "When a bankrupt, creditor, trustee or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

The courts have uniformly held that the method hereby provided is exclusive.

*In re* Schiller, 96 Fed. Rep., 400.
*In re* Russell, 105 Fed. Rep., 501.
*In re* Hawley, 116 Fed. Rep., 429.

Therefore, we submit, when the referee, on the 8th day of May, 1906, made his order and entered it at the end of his "record," denying the asking of petitioners to amend on the ground that the request had not been "made within the statutory time" and adjudging "that the petition aforesaid ought to be, and is hereby, dismissed with costs" (Record, p. 8); and when the petitioners failed to file with the referee any petition for a review of said order by the judge, in accordance with general order 27, above quoted; and when said referee had thereafter certified his record and filed it with the clerk of the court, the authority of the referee over the cause terminated; in other words, the order of reference became *functus officio*, and that official had no jurisdiction to make his order of July 6th; therefore the ruling of the court below denying appellant's motion to annul and set aside that order of the referee of July 6 was erroneous (Record, pp. 9-10).

We think it was equally plain, under the above-quoted provisions of the bankrupt act, that the judge himself had no authority to set aside the referee's judgment of May 8,

to reinstate the creditors' petition as a pending cause, and to allow it to be amended in the very respect upon which the referee had ruled it to be insufficient, and had dismissed it after holding that the time to amend had expired; therefore the order of the court below, made to that effect on July 16, was erroneous (Record, p. 10).

It was, of course, open to the petitioning creditors to obtain redress if any error was committed in the final judgment of the referee dismissing their petition by appealing to a higher court, if they were in a position to do so, just as we have done from a subsequent final judgment against our interest; but, not having done so, we submit that that judgment should stand.

## II.

THE COURT BELOW SHOULD HAVE GRANTED THE MOTION OF APPELLANT, MADE JULY 18, 1906, TO DISMISS THE AMENDED PETITION OF APPELLEES.

The motion referred to and the ruling thereon are found on pages 10 and 11 of the record. As evidence was taken on the first ground set out in the motion and the court found as a fact that the petition had been filed in duplicate and ordered its records amended accordingly, we admit that this court will not review that ground. We insist, however, that the second ground of the motion was well taken and the same should have been granted. While at the beginning one or two decisions leaned toward the position that the exception of the statute regarding the occupation of the alleged bankrupt need not be negatived in the petition, the great weight of later authorities is with our contention:

*In re* Mero, 128 Fed. Rep., 630.
*In re* Callison, 130 Fed. Rep., 987.
*In re* Brett, 130 Fed. Rep., 981.
*In re* White, 135 Fed. Rep., 199.
Rise *vs.* Bordner, 140 Fed. Rep., 566.
*In re* Taylor, 42 C. C. A., 1.

The record shows that petitioners did not even ask for leave to amend until after our motion was denied, but stood upon the sufficiency of their petition. We therefore insist that the ruling of the court upon the motion was erroneous under the above authorities.

## III.

THAT THE COURT BELOW ERRED IN ITS DETERMINATION OF THE ISSUE RAISED BY THE ANSWER OF APPELLANT TO THE CREDITORS' PETITION.

An inspection of appellant's answer (Record, p. 12) will show that by its terms three issues were made, to wit:

1st. Whether the alleged bankrupt was within the exceptions of the statute—that is, was a wage-earner or a person engaged chiefly in farming or the tillage of the soil.

2d. Whether said alleged bankrupt had committed an act of bankruptcy by permitting appellant to obtain an execution against him.

3d. Whether said alleged bankrupt had committed an act of bankruptcy by admitting his inability to pay his debts and his willingness to be adjudged a bankrupt.

We think it was necessary upon this issue that the petitioning creditors prove the negative of the first proposition—that is, prove that the alleged bankrupt was not included in the exceptions from the statute defining who could be adjudged bankrupts—and the affirmative of one of the two others—that is, the affirmative of either the second or the third.

The authorities all hold that, except touching one phase of the issue of insolvency where it arises, the burden of

proof is on the petitioning creditors to prove the allegations of their petition.

*In re* Pilger, 118 Fed. Rep., 206.
*In re* McLaren, 125 Fed. Rep., 835.
*In re* Doddy, Jourdan & Co., 127 Fed. Rep., 771.
Jones *vs.* Burnham *et al.*, 71 C. C. A., 240.

The allegations touching the second proposition were altogether insufficient to constitute an act of bankruptcy, even if proved, because not only must it be alleged that execution has been issued against the bankrupt's property, but that it is within five days of sale thereunder, and the bankrupt has not yet vacated or discharged it.

Seaboard Co. *vs.* W. R. Trigg Co., 124 Fed. Rep., 75.
*In re* Vastbinder, 126 Fed. Rep., 417.

But if the court will look either at the findings of fact made by the judge (Record, p. 18) or at the evidence itself, which the court attached thereto (Record, pp. 19-28), it will perceive that the petitioning creditors lost sight of every controversy except that as to the occupation of the bankrupt, and that the court later also made the same error, as there is neither finding nor evidence that the alleged bankrupt had committed either act of bankruptcy alleged or any act of bankruptcy whatever. In the absence of such proof, which it was the duty of petitioning creditors to furnish, there could have been but one proper finding, that Alvarado was not a bankrupt and that the petition should be dismissed.

But even upon the question of the occupation of the alleged bankrupt the findings of the court are very meager, really not enough to determine what was his occupation; but if the court feels at liberty to peruse the evidence, it will find that part of it which shows that said alleged bankrupt during the later years either owned or controlled

something like 1,400 acres of the land which in Porto Rico is used for farming—that is, which is fitted to raise coffee and other local products—while the stock of goods in his store (if it could be called a store where practically the business left was the collection of uncollectible accounts) was reduced to about $1,000.

But we shall not dwell upon this point, as those already discussed are so conclusive of this issue, merely contenting ourselves with citing a few of the decisions which treat of when a person will be considered as "chiefly engaged in farming."

*In re* Mackey, 110 Fed. Rep., 355.
*In re* Hoy, 137 Fed. Rep., 175.
Rise *vs.* Bordner, *supra.*
Wulbern *vs.* Drake, 56 C. C. A., 643.
Same case below, 114 Fed. Rep., 229.

## IV.

As the question of the jurisdiction of this court is always open to inquiry, we will add a word on that point.

The appeal is taken under the terms and in the manner provided for in General Orders in Bankruptcy XXXVI, subdivisions 2 and 3, in conjunction with the provisions of section 24 of said bankruptcy act and section 35 of the civil government act of Porto Rico (31 Stats. at Large, 85). That the same should be by appeal and not by writ of error was decided in—

Elliott *vs.* Toeppner, 187 U. S., 327.

## V.

We therefore submit, in conclusion, that the order or decree of the court below adjudging the said Pascasio Alvarado a bankrupt should be reversed, with directions either to al-

low the dismissal already entered on May 8, 1906, to stand as the final judgment of the court or to enter a judgment of dismissal upon the issues as joined and tried in the court below on July 19, 1906, for which we humbly pray.

Respectfully submitted,

N. B. K. PETTINGILL,
HARRY P. LEAKE,
*Counsel for Appellant.*

# ARMSTRONG, AS LIQUIDATOR OF BOYSEN & COMPANY, *v.* FERNANDEZ.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 114. Submitted January 17, 1908.—Decided February 24, 1908.

The power of the bankruptcy court over amendments is undoubted and rests in the discretion of the court. In this case that discretion was not abused in allowing amendments adding the name of the place to the jurat of the justice of the peace taking the verification, and an averment that the person proceeded against in bankruptcy did not come within the excepted classes of persons who may not be declared bankrupts.

Where the record of a proceeding to have a person declared a bankrupt shows that detailed findings of the commission of acts of bankruptcy could have been supported by the evidence, the presumption is that such findings would have been made had appellant so requested; and, in the absence of such a request, the general finding that the party could be declared, and was adjudged, a bankrupt is sufficiently broad to cover any question involved upon the evidence as to the bankrupt's occupation and the commission of acts of bankruptcy.

APPELLEES, residing in Juana Diaz, Porto Rico, filed on the twenty-ninth day of March, A. D. 1906, their petition in duplicate, praying that Pascasio Alvarado, also of Juana Diaz, be adjudged a bankrupt. They averred that Alvarado had, for the greater portion of six months next preceding the filing of the petition, his principal place of business at Juana Diaz, and owed debts to the amount of a thousand dollars, and that petitioners were his creditors and had provable claims amounting in the aggregate, in excess of securities held by them, to the sum of five hundred dollars, the nature and amount of each of said claims being specified.

The petition further stated "that said Pascasio Alvarado is insolvent, and that within four months next preceding the date of this petition the said Pascasio Alvarado committed an act of bankruptcy, in that he did heretofore, to wit, on the

twenty-eighth day of February, A. D. 1906, permit and suffer several of his creditors, to wit, Alberto Armstrong *et al.* to secure and obtain an advantage through legal proceedings over his creditors, in that he suffered and permitted the said —— to attach all of his properties and interest, real and personal, by virtue of a writ of *fieri facias* issued out of the United States District Court for Porto Rico on January 20, A. D. 1906, on a judgment rendered in the above said court at the January Term, A. D. 1906, in favor of the said Alberto Armstrong *et al.* and against the said Pascasio Alvarado. And your petitioners further represent that within four months next preceding the date of this petition, the said Pascasio Alvarado did commit another act of bankruptcy in that he did, heretofore, to wit, on the fourteenth day of March, 1906, in a letter addressed to Eduardo Fernandez, one of the petitioners, admit his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

Alvarado was served with process March 30, returnable April 13, and on April 24 an order was made by the clerk of the court reciting the absence of the judge from the division of the district, and referring the petition to a referee in bankruptcy in the city of Ponce and District of Porto Rico.

On the twenty-eighth of April counsel for Armstrong, as liquidator of the firm of Boysen & Company, creditors of Alvarado, moved the referee to dismiss the petition because of the defectiveness of verification. The alleged defect was because the justice of the peace who took the jurat had omitted to attach to his signature of "justice of the peace" the words "of Juana Diaz, Porto Rico."

On the eighth of May the referee overruled a motion to amend and dismissed the petition with costs. Afterwards he filed in the clerk's office an order, dated July 6, stating that a motion for rehearing had been granted, and setting aside the order of dismissal, at the same time directing that the amendment might be made.

Thereafter, July 16, 1906, motion was made by counsel for

Armstrong and others in the District Court, before the judge thereof, to set aside the order of the referee dated July 6, whereupon the court set aside the clerk's order of reference and ordered the case back for further proceedings. And then the court denied the motion of counsel for Armstrong *et al.*, and gave the petitioning creditors until the eighteenth to amend their petition in the matter of the verification. On the seventeenth of July the amendment was made by inserting after the words "justice of the peace," at the close of the verification, the words "of Juana Diaz, Puerto Rico;" and the justice of the peace so certifying.

July 18, Armstrong's attorneys again moved to dismiss on the ground that the petition did not make the averment that the alleged bankrupt did not come within the excepted classes of persons who might not be declared bankrupt. This motion was denied by the court, and the petitioning creditors were allowed to amend in the particular named.

The amendment was made so as to aver that Pascasio Alvarado "is not a wage earner nor a person engaged chiefly in farming or the tillage of the soil, and who is chiefly engaged in commercial business."

July 19, Armstrong and others by answer denied "the allegations of the involuntary petition that the alleged bankrupt does not come within the excepted classes of the bankruptcy act and that he has committed the acts of bankruptcy therein alleged."

On the same day the court heard the testimony of the petitioning creditors, Fernandez *et al.*, "upon the issue raised by said answer." At its conclusion counsel for opposing creditors moved that the petition be dismissed, which motion was denied. Then the court heard "the testimony offered by the opposing creditors, and at the conclusion of all the testimony overrules said answer and denial, and directs that a proper order of adjudication and reference be prepared, to which counsel for Armstrong *et al.* except."

The order of adjudication was thereupon entered.

An appeal to this court was prayed and allowed, and errors assigned to the effect that the referee in bankruptcy erred in granting a rehearing by his order of July 6; that error was committed in refusing to annul that order of the referee; that the court also erred in overruling the motion of July 18, to dismiss the petition; and that the court erred in adjudicating Alvarado a bankrupt.

The district judge filed findings of fact and conclusions of law under General Order XXXVI as follows:

"On July 16, 1906 when the present incumbent of this bench held his first term of court at Ponce in this district, the above-entitled matter came on for hearing, and it developed that the petition for involuntary bankruptcy had theretofore been duly filed and sent out to the referee, who, it appears, had first dismissed the petition for informality as to the verification thereof, but thereafter rescinded his order in that regard and permitted the petition to stand. On this state of affairs, Armstrong & Company, in open court, moved that the petition be dismissed for improper verification, in accordance with the first action of the referee. Other creditors resisted this motion. The court thereupon entered an order recalling the matter from the hands of the referee, and in open court permitted the verification *nunc pro tunc* to be corrected and the petition to be considered as filed, as thus amended. Then the question as to whether or not the defendant was a person 'engaged chiefly in agriculture or the tillage of the soil' was raised by Armstrong & Co., and on the decision of which would depend the right of the court to declare him a bankrupt at all. On this question the court gave the parties opportunity to procure evidence, and set the case down for a succeeding day for that purpose, and did, at the time fixed, hear evidence pro and con on the subject. From the evidence thus adduced the following facts appear:

"That Pascasio Alvarado is now a feeble old man living at Juana Diaz near said Ponce with his sons, one of whom conducts his business, which it appears is being wound up;

that for more than twenty-five years last past he has been engaged in conducting a large mercantile business at said place, and that he kept a stock of goods ranging from twenty-five thousand dollars upwards, continuously, and was well known to the wholesale merchants of Europe, and perhaps of the United States; that during the last two years he has been, or at least his sons for him have been, engaged in selling out the remainder of his stock of goods and in endeavoring to collect the debts belonging to the estate, in cash and in coffee and other products; that at the time the business was put into liquidation and his son took charge of it, and since, the estate was in possession, or *quasi* possession, of several pieces of land under mortgage, which it collected payments from in the way of portions of the coffee and other crops raised, and perhaps the estate was the absolute owner of some small portion of land itself, on which some coffee is raised. Most of the evidence thus taken is transmitted herewith, duly certified. The court, of course, had the benefit of the full record of the case and of the arguments of counsel and statements made in open court at the time.

"The court held on this evidence, that the defendant was not a 'wage earner or a person chiefly engaged in the tillage of the soil,' but that he was, and is, a merchant, and that all the debts he owes, were created as a merchant, and that he could, therefore, be declared a bankrupt, and so held. From this action of the court, Armstrong & Co., who have some attachment or other liens on some of his estate, not four months old at the time of the filing of the petition, have appealed."

*Mr. N. B. K. Pettingill* and *Mr. Harry P. Leake* for appellant:

Neither the referee nor the court had any jurisdiction to reinstate the cause after the order of dismissal made by the referee on May 8, 1906, which was as authoritative and final as though made by the judge himself. *Neustadter* v. *Chicago &c. Co.*. 96 Fed. Rep. 830; *In re T. L. Kelly Dry Goods Co.*, 102 Fed. Rep. 747; *In re Rosenburg*, 116 Fed. Rep. 402.

The court below should have granted the motion of appellant, made July 18, 1906, to dismiss the amended petition of appellees.

As evidence was taken on the first ground set out in the motion and the court found as a fact that the petition had been filed in duplicate and ordered its records amended accordingly, this court will not review that ground. The second ground of the motion, however, was well taken. While at the beginning one or two decisions leaned toward the position that the exception of the statute regarding the occupation of the alleged bankrupt need not be negatived in the petition, the great weight of later authorities is with our contention. *In re Mero*, 128 Fed. Rep. 630; *In re Callison*, 130 Fed. Rep. 987; *In re Brett*, 130 Fed. Rep. 981; *In re White*, 135 Fed. Rep. 199; *Rise* v. *Bordner*, 140 Fed. Rep. 566; *In re Taylor*, 42 C. C. A. 1.

The court below erred in its determination of the issue raised by the answer of appellant to the creditors' petition. Three issues were made in appellant's answer:

Whether the bankrupt was within the exceptions of the statute, that is, was a wage-earner or a person engaged chiefly in farming or the tillage of the soil; whether he had committed an act of bankruptcy by permitting appellant to obtain an execution against him; and whether he had committed an act of bankruptcy by admitting his inability to pay his debts and his willingness to be adjudged a bankrupt.

Upon this issue it devolved upon the petitioning creditors to prove the negative of the first proposition—and the affirmative of either the second or the third.

The burden of proof is on the petitioning creditors to prove the allegations of their petition. *In re Pilger*, 118 Fed. Rep. 206; *In re McLaren*, 125 Fed. Rep. 835; *In re Doddy, Jourdan & Co.*, 127 Fed. Rep. 771; *Jones* v. *Burnham et al.*, 71 C. C. A. 240.

The allegations touching the second proposition were altogether insufficient to constitute an act of bankruptcy, even if proved, because not only must it be alleged that execution has

been issued against the bankrupt's property, but that it is within five days of sale thereunder, and the bankrupt has not yet vacated or discharged it. *Seaboard Co.* v. *W. R. Trigg Co.*, 124 Fed. Rep. 75; *In re Vastbinder*, 126 Fed. Rep. 417.

There is neither finding nor evidence that the alleged bankrupt had committed either act of bankruptcy alleged or any act of bankruptcy whatever. In the absence of such proof, which it was the duty of petitioning creditors to furnish, there could have been but one proper finding, that Alvarado was not a bankrupt.

No counsel appeared for the appellees.

MR. CHIEF JUSTICE FULLER, after making the foregoing statement, delivered the opinion of the court.

This is an appeal from a court of bankruptcy, "not within any organized circuit of the United States," from a judgment adjudging Pascasio Alvarado, a bankrupt under § 24*a* and § 25*a* of the bankruptcy act, and General Order XXXVI, 3.

The errors assigned in reference to the action of the referee and of the court in permitting the amendment of the verification and other amendments we regard as without merit. The power of a court of bankruptcy over amendments is undoubted and rests in the sound discretion of the court. We think there was no abuse of discretion here and that the court was fully justified in its orders in reference to amendments.

Nor do we see any reason to question the conclusion of the District Court "that the defendant was not a 'wage earner or a person chiefly engaged in the tillage of the soil,' but that he was, and is, a merchant, and that all the debts he owes were created as a merchant, and that he could therefore be declared a bankrupt."

The appellant Armstrong now contends, however, that the petitioning creditors "lost sight of every controversy except that as to the occupation of the bankrupt, and that the court

later also made the same error, as there is neither finding nor evidence that the alleged bankrupt had committed either act of bankruptcy alleged, or any act of bankruptcy whatever."

The acts alleged were that Alvarado permitted Armstrong to obtain an execution against him; and also that Alvarado admitted in a letter addressed to Fernandez "his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

And the record shows that the court heard testimony on behalf of Fernandez and others, petitioning creditors, as to the commission of the acts of bankruptcy as well as to the occupation of the bankrupt. The court then denied Armstrong and others' motion to dismiss, and heard testimony on their behalf, and at the conclusion of all the testimony directed the order of adjudication. From that order of adjudication this appeal was prayed, but it nowhere appears that Armstrong and others objected to the want of proof of the acts of bankruptcy or asked any findings in respect thereto, or objected to the findings that were made for deficiencies in that regard. In other words, Armstrong and others permitted the findings to be made as they were, and now say that other findings should have been made in relation to proof of acts of bankruptcy, without having objected that they were not made, or that the findings as made were on that account fatal to the judgment. The presumption is that if such a suggestion had been made to the court, the alleged deficiencies, if really existing, could have been supplied and would have been supplied. But the record and the certificate of the judge leave no doubt that the petition as to acts of bankruptcy was sustained by the facts.

The last error assigned is that the District Court erred in finding from the evidence offered on July 19, 1906, "upon the issue between said petitioning creditors and these opposing creditors that said Pascasio Alvarado should be adjudged a bankrupt and in so adjudging him," and that, of course, was broad enough to cover any question involved upon the evi-

dence; but we think that that was intended to cover the finding as to Alvarado's being a merchant and not a wage earner, etc., and therefore susceptible of being declared a bankrupt.

The findings of fact and conclusions of law made by the district judge for transmission to this court, under the general order in that regard, set forth, among other things, that, after the petition was amended, "Then the question as to whether or not the defendant was a person 'engaged chiefly in agriculture or the tillage of the soil' was raised by Armstrong & Co., and on the decision of which would depend the right of the court to declare him a bankrupt at all. On this question the court gave the parties opportunity to procure evidence, and set the case down for a succeeding day for that purpose, and did, at the time fixed, hear evidence pro and con on the subject." And from that evidence the court stated the facts which appeared, and his finding and conclusion that Alvarado was a merchant, etc.

It seems clear that the acts of bankruptcy had been previously determined as committed and that the case was only contested on the other point, and hence that this contention is an afterthought, which ought not to be entertained, let alone that from the findings that were made it is obvious enough that Alvarado was in liquidation and might properly be adjudged a bankrupt.

*Decree affirmed.*